Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

Filed: May 5, 2003
Filed Electronically

FURTHER COMMENTS OF THE MORTGAGE BANKERS ASSOCIATION OF AMERICA

The Mortgage Bankers Association of America (MBA) appreciates the opportunity to comment on the Federal Communications Commission's (the FCC) Further Notice of Proposed Rulemaking (FNPR) resulting from the passage of the Do-Not-Call Implementation Act (DNCIA or "the Act"). The Act calls for the FCC to complete its rulemaking proceeding on telemarketing restrictions and to consult and coordinate with the Federal Trade Commission (FTC) to maximize consistency with the FTC's final Telemarketing Sales Rule (TSR). More specifically, the Act requires an analysis of any inconsistencies between the rules promulgated by each Commission and the effect of any such inconsistencies on consumers and person paying for access to the registry. The FNPR also seeks proposals to remedy any such inconsistencies.

MBA applauds the FCC's efforts to seek additional public comments prior to issuing final rules in light of the considerable developments since the filing date of the FCC's notice of proposed rulemaking on this subject. The FTC's adoption of a final amended TSR establishing a national do-not-call registry and the passage of federal funding for the project changes the regulatory landscape. The question is no longer whether there will be a national do-not-call registry, but what policies and procedures will implement such a registry, what telephone solicitations will be exempt and what entities must comply. We would like to offer our comments in an effort to ensure workable standards and a single do-not-call database. Although we believe that the FCC must adopt rules that are slightly different from the FTC's, we urge the FCC and the FTC to require businesses to access only one federal do-not-call database. Also, in light of the fact that the FCC has much broader jurisdiction than the FTC, we strongly urge the FCC to adopt a face-to-face exemption or similar exemption for local calls. We also support the FCC's current definition of the established business relationship exemption, and urge the FCC to retain its definition when it imposes do-not-call rules. The FCC's established business relationship is preferred over the FTC's rule because it extends to affiliates and subsidiaries and does not impose an artificial termination date.

Development of a Single National Do-Not-Call Database for Federal and State Compliance

A key concern for mortgage lenders is the need to access multiple do-not-call databases with often conflicting rules. Under the FTC's final amended TSR, lenders and other telemarketers will have to maintain at least three levels of compliance: compliance with a national do-not-call registry, multiple state do-not-call databases, and company-specific do-not-call lists. There are currently 33 states that have do-not-call statutes. The addition of a national do-not-call registry and the retention of the company-specific do-not-call lists increase the complexity of compliance and the chances for error. The layering of requirements adopted by the FTC is overly complicated and costly and should be simplified, to the extent possible, to ensure that all telemarketers have fewer sources to contact when complying with do-not-call requirements. As the FCC deliberates ways to coordinate with the FTC, we respectfully request that specific emphasis be placed on maintaining a single database.

In particular, we urge the FCC not to create a separate federal do-not-call registry from that being developed by the FTC. It would be a disservice to all companies that transact business with consumers over the telephone to add yet another database on top of the myriad of lists that must be consulted today. The FCC's original notice of proposed rulemaking was not definitive on whether it would establish a joint database with the FTC or maintain its own national registry. It is, therefore, important for the MBA to stress the need for a single database.

MBA also urges the FCC to make every effort to combine all state registries within the national do-not-call registry. Such a system will allow telemarketers to access one source for complying with the state registries and the national do-not-call registry.

Conflicting FCC and FTC rules

In earlier deliberations, the FCC questioned whether it should merely extend the FTC's national do-not-call requirements to those entities that fall outside the FTC's jurisdiction or develop its own set of requirements. We do not believe complete deference to the FTC's final rule is appropriate. There are numerous differences between the Commissions' jurisdictions and authorizing statutes that require specific attention. The simple fact that the FTC does not have jurisdiction over intrastate calls requires the FCC to deal specifically and thoughtfully with this matter.

We would like to focus on some of the differences between the FTC's final amended TSR and the FCC's current Telephone Consumer Protection Act (TCPA) rules that should be addressed in the FCC's final rule on telemarketing and the do-not-call registry.

Treatment of Intrastate Calls: The Need for a Face-to-Face Exemption

A significant distinction exists between the FCC's and the FTC's jurisdictional authority. As you are aware, the FTC has jurisdiction only over interstate calls, and therefore, the TSR amended rule cannot apply to intrastate calls. As other industry groups have explained in their comments, this Commission's jurisdiction extends to both interstate *and intrastate* calls. This difference in jurisdictional authority creates a significant distinction between any FCC rule and FTC's final amended TSR. In essence, the FTC provides a *de facto* intrastate exemption, while the FCC's rules, without more, would not. In order to create some uniformity between the two rules and to provide local businesses with some relief currently offered by the FTC, we urge the FCC to adopt a face-to-face or local exemption.

MBA is extremely concerned that the FTC did not extend its face-to-face exemption to the do-not-call list requirements. It is important to point out that the FTC's decision not to extend the face-to-face exemption to the do-not-call provisions was based substantially on the fact that face-to-face transactions inherently involve intrastate calls, which are exempt from the FTC rule. 68 Fed. Reg. 4655 (Jan. 29, 2003). The FTC states "most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule's coverage." We agree generally with this premise as it relates to mortgage banking as well. The majority of telephone solicitations by mortgage originators would be intrastate calls due to the complex nature of the transaction and the paper intensive process that requires a face-to-face closing. Had the FTC's jurisdiction under the Telemarketing Act extended to intrastate calls, we believe this issue would have garnered greater attention. For this reason we appeal to the FCC for further consideration of this issue.

As we have previously explained in more detail, a face-to-face transaction is one in which a business does not seek to complete a sale or secure payment over the telephone. Rather, the businessperson uses the call to set up a face-to-face meeting to discuss products and services. MBA believes that the FCC has the explicit statutory authority to offer such an exemption because the TCPA contemplated special rules for local businesses. The TCPA provides that the FCC shall consider in rulemaking proceedings regarding residential subscribers' privacy rights "whether different methods and procedures[1] may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits." 47 U.S.C. §227(c)(1)(C).

As MBA has explained in its previous comments, in light of the legislative history describing the scope of the local call exemption and the recognition by Congress that such calls are less intrusive, we urge the FCC to consider providing a face-to-face exemption to the do-not-call provisions. As noted in the legislative history, local calls are inherently less problematic because these local businesses are cautious in their contact

[1] The methods and procedures referred to in this provision include electronic databases, telephone network technology, special directory markings and other "do-not-call" systems.

with potential customers because they "are subject to the scrutiny of the community, and must live by their reputation in the community, regardless of the specific type of business they conduct." Because the FTC cannot reach intrastate calls, such an exemption would also bring the FCC and FTC rule into greater conformity and would be within the spirit of the TCPA.

Established Business Relationship

The FTC's final rule provided an exemption from the do-not-call registry for "established business relationships." Under the FTC rule a telemarketer or seller may call a consumer with whom it has an established business relationship for up to 18 months after the consumer's last purchase, delivery, or payment, even if the consumer's number is on the national do-not-call registry. In addition, a company may call a consumer for up to three months after the consumer makes an inquiry or submits an application to the company. See 16 C.F.R 310.2(n). However, if the consumer asks a company not to call, the company may not call, even if there is an established business relationship and the consumer did not place his or her name on the national do-not-call registry. The FTC turned to the FCC's implementing TCPA regulations for guidance in defining an "established business relationship." As a result, the core concept of the FTC's established business relationship is consistent with that of the FCC's. However, there are three significant distinctions between the definitions:

FCC Must Extend the Established Business Relationship to National Do-Not-Call Rules: The current FCC's established business relationship exemption only applies to company-specific do-not-call registries; whereas, the FTC's exemption applies to the national do-not-call requirements. As is mandated by the TCPA, any final rule adopted by the FCC must extend the "established business relationship" exemption to the national do-not-call registry rules. MBA believes that the current FCC definition is the appropriate definition.

Time Limitation of the Exemption**:** Another significant distinction between the FCC's and FTC's established business relationship rule is how long the business relationship is deemed to last following a transaction between a seller and a consumer. The FCC's definition does not place a time limitation on the exemption. The FTC limits the exemption to 18 months after the last purchase, delivery or payment or three months after a consumer inquiry or application. MBA supports not imposing a time limitation on the established business relationship. While the FTC's definition is well intentioned and appears reasonable on its face, it does not adequately address a number of mortgage banking transactions, including unused home equity lines of credit and mortgage broker or wholesale lender relationships after the loan is sold into the secondary market and the servicing is transferred (i.e., "loans sold servicing released").

The FTC's preamble clarifies that an established business relationship is based on a purchase, lease, rental, or financial transaction and runs from the date of the *last payment* or transaction, not from the first payment. This definition, while helpful in understanding the impact on business relationships that extend over time, also raises questions for particular loan products. For example, are mortgage lenders permitted to contact customers who obtained home equity lines of credit if those lines are unused for more than 18 months? Such a distinction between first lien mortgages and home equity lines is unfortunate and surely unintentional. However, there needs to be a more realistic approach for dealing with industry specific scenarios. Ideally, not imposing a time limitation on the established business relationship is the best method for resolving this and other problems all industries will face when applying the rule to day-to-day activities. In the alternative, however, we ask the FCC specifically to address this issue by permitting such contact based on the outstanding commitment by the lender to allow draws on the line.

Not placing a time limitation on the established business relationship will also address how businesses may contact customers when the underlying asset is sold. It is typical today for a mortgage loan to be originated through a number of intermediaries and then sold into the secondary market servicing released. The transaction often follows this path: A loan broker takes a borrower's application and processes the financial information, but does not close the loan in its name. The funds are provided at the closing table by a mortgage company often called a "wholesale" lender. To facilitate assignment of the mortgage and endorsement of the notes, the loan is closed in the name of the wholesale lender. The wholesale lender sells the loan into the secondary market and sells the right to service the loan (i.e., the servicing asset) to another mortgage company, which will collect the monthly mortgage payments over the life of the loan. In this case, it is unclear whether the mortgage broker who took the application and the wholesale lender who funded the transaction would be able to call the customer after 18 months from loan closing. Most brokers or loan originators consider the borrower to be their client despite the loan and servicing being sold to a third party. As a result, it is common for the broker and/or wholesale lender to call the borrower three or four years after consummation to inform him or her of refinancing opportunities. The consumer is not likely to be surprised or upset if he or she received a call from the loan officer more than 18 months after the transaction was consummated. A time restriction on subsequent contact would impede this communication, especially with certain financial transactions where the opportunity is tied to economic conditions that do not coincide with an 18-month time limit.

<u>Application to Members of Corporate Family:</u> MBA supports the concept of applying the established business relationship exemption to all members of the corporate family. This approach is consistent with the current FCC rule, which provides that the established business relationship exemption extends to the company's affiliates and subsidiaries. The FTC's amended rule, however, limits this exemption to those affiliates that the consumer would reasonably expect to be included in the exemption given the nature and types of goods or services offered. The FTC's rule fails to provide a bright line test. Although not problematic in the context of compliance with the FTC's regulation, as most telemarketers would be able to determine if there is a reasonable nexis between affiliate products and services, our concern is with the TCPA's private right of action. The private right of action allows citizens to seek statutory penalties for violations of the TCPA. This private right of action raises considerable liability risk for telemarketers, which is not present with the FTC rule and Telemarketing Act. We believe that this

distinction deserves consideration. Granting an exemption in keeping with existing FCC rules for affiliates would eliminate significant litigation risk and costs to the telemarketing community.

<u>Shelf Life of a Do-Not-Call Request</u>

Current FCC rules require companies to honor company-specific do-not-call requests for 10-years. The FTC's final amended TSR rule imposes a 5-year life on requests to the national do-not-call registry. We highly recommend a consistent shelf life for requests to a company-specific or national do-not-call list. We agree with the FTC findings that a 5-year life is appropriate. We do not see a material distinction between the company-specific lists and national list that would warrant separate time lines.

<u>Conclusion</u>

The FCC's importance in these proceedings is paramount. The Commission's jurisdiction is so extensive that the decisions it makes with regard to telemarketing will have a more profound impact on businesses than those adopted by the FTC. While we want to promote uniformity, there are a number of protections that must be preserved. To the extent that the FCC can adopt FTC regulations without conflict and without imposing considerable hardship on businesses, then such efforts should be taken. However, the FCC should not defer to the FTC rules in all cases. A face-to-face exemption and the expansion of the FTC's established business relationship rule are critical to ensure continued productive, noninvasive communications between mortgage lenders and consumers. MBA appreciates the opportunity to offer our views and we would welcome any opportunity to discuss them further.

Respectfully submitted,

/s/
Kurt Pfotenhauer
Senior Vice President
Mortgage Bankers Association of America
1919 Pennsylvania Avenue
Washington, DC 20006
(202)557-2857